2005 ANNUAL REPORT

Consumer Protection & Antitrust Division

REPORT ON THE REFORM OF THE POLICIES AND PROCEDURES OF THE DIVISION

(Submitted pursuant to K.S.A. 50-628 and K.S.A. 50-109)

ATTORNEY GENERAL
PHILL KLINE

MEMORANDUM

CONSUMER PROTECTION
& ANTITRUST DIVISION

To: All Interested Parties
From: Deputy Attorney General Bryan J. Brown
Subject: The Reform of the Consumer Protection and Antitrust Division
Date: October 30, 2006

I am pleased to tender an overview of the reformation and reconstruction of the Consumer Protection and Antitrust Division pursuant to the directives communicated to me in December 2002 and January 2003 by Attorney General Phill Kline.[1]

The following are the foundational stones upon which General Kline ordered his re-organized Consumer Protection and Antitrust Division erected:

1. The mission statement of the Kline Administration as a whole: "Promoting human dignity through justice with compassion and professional excellence."

2. The charge to never "engage in extortion or misuse the power of the office to achieve an unjust result, regardless of who the consumer is" and to carefully balance against this order the directive to "identify and serve the most vulnerable, especially those vulnerable due to advanced years or medical conditions, and to grant them a preference when investigating consumer cases."

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[1] This report is tendered in keeping with the obligation that the annual report detailing the activities of the Attorney General "include a statement of the investigatory and enforcement procedures and policies of the attorney general's office." K.S.A. 50-628(b) and K.S.A. 50-109(d). Other than General Kline's previous introductions reporting on the change in managerial philosophy in the Division, the instant thorough and detailed reporting constitutes the only known overview of the historic policies and procedures of the Division. No such explanation is found in any annual report of the Division filed in the State Library. This report is a continuance of a report tendered to the Legislative Budget Committee of the Kansas House of Representatives on September 1, 2005. The author of this memo recommends that report to any who seek further details on the Division's Reform of 2003.

3. The charge to "create a management system in which each public interface is governed by protocols to ensure professionalism; in which all due process rights are respected; and that generates rapid, accurate, brief responses."

I submit that the following report documents the transformation of the Consumer Protection and Antitrust Division along the lines ordered by a constitutional office holder. This transformation is presented herein as the "Reform of 2003."

The State of the Consumer Protection and Antitrust Division Prior to January, 2003

By reading the annual reports of the Division since 1979 and by conducting interviews with those working in the Division in 2003 (and some that had worked in the Division in years before that), the author of this memo was able to ascertain with some certainty the operational philosophy of the Division prior to 2003.

That operational philosophy is presented herein. It is one so common among government offices in states, counties and municipalities across the nation as to be stereotypical.[2]

Pre-2003 Operational Philosophy

It was my observation that the primary goal of the Division prior to 2003 was to successfully resolve the most number of consumer complaints in the complaining consumers' favor, and by so doing return the most monies to complaint-writing consumers in the form of so-called "consumer restitution."[3] For this reason, the previously filed annual reports of the Division contain few statistics other than "consumer restitution" and the gross number of consumer

[2] *See, e.g.*, Former Nebraska Attorney General Don Stenberg, Avoiding and Settling State Attorney General Lawsuits, Washington Legal Foundation Vol. 19 No. 15 (May 30, 2004).

[3] One can consult the annual reports from 1979-2002 for more detail on this stated objective. They are filed in the archives of the State Library. Any discussion of "consumer restitution" dollars and the Consumer Protection Division leads one through fuzzy math and onto soft ground, for the numbers found in past annual reports are seldom reflected in accounts managed by the Division. Some are merely the telephonic report of a consumer who was able to receive an economic benefit (in the form of contract rescission, monies returned, apology or a nuisance value payment) sometime after filing a complaint with the Division. Some investigators recounted being ordered to claim such undocumented savings even when the merchant's agreement to refund came before the Division could respond to the filed complaint. It should also be noted that many of the largest consumer restitution returns, such as the $13.5 million dollar gain of 1988, were the result of lucrative multistate actions in the years before that source in income began to wane. *See* Tables, *infra*.

complaints received – regardless of the merit of the claims advanced.[4]

This primary goal of "successfully" addressing consumer complaints was primarily realized through the mailing of "investigation" letters bearing the seal of the Office of the Attorney General. Many former laborers in that process refer to the pre-reform procedures as a secretarial pool for that very reason.

A secondary goal appeared to be the accumulation of the maximum amount of operational monies into the Division's accounts. This accumulation of monies was primarily from multi-state investigations led by the National Association of Attorneys General. (NAAG) The most lucrative of these multistate actions (since 2000) are presented in the statistical analysis portion of this report. The previously filed annual reports of the Division contain few reports on these crucial statistics. The statistics for the past seven years are presented, *infra*.

My review further convinced me that principles of right reason, sound economics, justice, or governmental restraint were not the primary touchstones informing Divisional decisions once a consumer complaint was tendered or multistate action announced.

By way of example, standard procedure followed prior to the Reforms of 2003 mandated that almost every complaint tendered to the Division generated a form letter to the business targeted by the complainant. That letter informed the merchant of an investigation by the Office of the Attorney General, and also communicated the Attorney General's desire that the merchant consider resolving the complaint to the consumer's advantage.

This is the standard consumer protection model deployed in government offices across the nation, and has its roots in the consumer empowerment movement of the 1970's. While

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[4] Statistics that are not commonly reported in the annual reports are found at the conclusion of this report. The above footnote discusses the tendency toward inflation and even exaggeration found in "consumer restitution" numbers. The same can be found in the reporting of monetary judgment arising out of litigation efforts. It is not uncommon for litigation to result in a large judgment and no funds. The Division's 2005 judgment against Alicia Morales Phillips for $660,000 is but one example. That judgment has resulted in no payments to the Division. A similar example is the $100,000 judgment against a litigant from many years ago. That judgment was recently satisfied, after the statute of limitations had run, by payment of less than $5,000. This was collected only due to the new emphasis upon the collection of judgments in the Division, a process completely lacking in the years prior to the Reform of 2003. This debt collecting task force, dubbed the Delta Five, is yet another positive result of the Reform of 2003. The point to be made in this footnote is this: **Many of the monetary statistics that have been reported out of the Division in the past are debatable at best.** This is especially the case when "consumer restitution" is investigated in the files of the Division. Real dollars in the bank is the benchmark that should be most valued. Those numbers are presented in Table B, *infra*.

effective in pleasing constituents, such a system does little to promote the development of consumer law jurisprudence or educate suppliers as to their obligations under the Consumer Protection Act, K.S.A. 50-623, *et seq.* ("KCPA")

Also by way of example, it appears that few, if any, multistate opportunities were passed over before the Reforms of 2003. While joining any and all such actions is a certain path to increased revenue, many of the past NAAG multistates have been critiqued as a form of state sanctioned extortion. There can be little doubt that the announcement of an investigation by a consortium of state attorneys general can cause great consternation on the board of a corporate entity, regardless of the merits of the underlying action. *See*, Stenberg, footnote 2, *supra*.

Nevertheless, such multistate actions have been the standard consumer protection model utilized by the National Association of Attorneys General (NAAG) for decades. It has only recently began to show signs of failing as a methodology to fund consumer protection agencies and attorney general offices.

The primary goal of increasing the filing of consumer complaints, which is front and center in most all of the annual reports filed between the years 1996 to 2002, was accomplished by broadcasting the message that the Attorney General's Consumer Protection Division stood prepared to address most any and all problems arising in the transactional context.

And they did just that, as the five examples (*infra*) from a fourteen month period aptly demonstrate.

The prior annual reports of the Consumer Protection Division document an exponential rise in complaints received and processed, from 4,308 in 1995 to an all time high of 8,332 in 2001.[5] This almost 95% increase in the number of complaints being filed with the Consumer Protection Division took place while the population of Kansas grew less than 5% during that same time period.[6]

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[5] Note that the following year (2002) was the ten year low point for actual dollars brought into the Division and also the ten year low for the filing of enforcement actions. These statistics suggest that the sheer number of complaints filed does not result in increased revenue or increased litigation. It was not, however, a low point for the mailing out of investigatory letters of questionable merit. *See* data analysis, *infra*.

[6] *See* population statistics, Table G , *infra*.

Heavy Case Loading and Mediation Tactics Prior to the Reform of 2003[7]

The emphasis upon a constantly increasing case load resulted in overburdened support staff, investigators and Assistant Attorneys General. In January, 2003, most investigators were tasked with a case load exceeding 300 in number; more than a few of the Division's investigators struggled under a load exceeding 400 open cases. Such heavy loading had a predicable result: the cases that appeared easiest to process received the most attention. These cases were most often allegations against a "brick and mortar" Kansas business, since such "targets" were easy to reach and easier to intimidate into compliance.[8]

This overwhelming case load also created the conditions in which cases were not closed in an efficient time frame. During initial interviews, the author of this memo heard a constant refrain from Assistant Attorneys General along these lines: Stale cases were often presented to them that could have been resolved through credit card challenges or in small claims court had the complaints been presented to an AAG in a timely fashion. Because these cases were often subjected to review by an AAG only after many letters had been sent to the merchants and consumers, and usually after the period to challenge a credit card charge or statute of limitations had run, such common sense resolutions were not viable. The problem was then one that could be resolved only by stale action – action that had not been justifiable in the first instance, but that would have to be taken up in the second instance since all other routes were then closed due to the passage of time.

Statistical sampling of the database revealed the following temporal trend analysis:

Year	Most days file open	Average days file open

[7] "[E]fforts to mediate and settle complaints to the Attorney General's Consumer Protection Division have led to the collection of nearly $700,000 in restitution paid directly to Kansas consumers." 1988 Annual Report, page 2. "As a result of lawsuits, settlements and mediation, consumers were saved $1,426,699 [in 1994]". 1994 Annual Report, Introduction. While no mention of mediation efforts are found in the annual reports after 1995, the mediation program that had proved so successful in transferring monies from merchants to complaining consumers in years past continued unabated until the Reform of 2003. While a mediation of some type may be the result of an investigation, the Division is not situated to serve as a mediator in the truest sense of that word. While the mediation prior to 1996 appeared to be checked by the rubrics of the KCPA, much that occurred between 1996 and 2003 appears to have been unchecked. But see footnote 10, *infra*.

[8] As the overreaching examples presented herein demonstrate, resident Kansas businesses were not allowed the luxury of ignoring a consumer complaint filed with the Office of Attorney General, no matter how banal or bereft of merit the allegations contained in the complaint. Even too much mayonnaise was considered a violation of K.S.A. 50-626 or K.S.A. 50-627. (The file contains no clue as to whether the reviewing Special Agent and AAG thought too much mayonnaise to be a deceptive act or unconscionable act – or both.)

2000	1065	173
2001	841	148
2002	667	187

These random samplings suggest that most of the merchants subject to a complaint filed with the Division in the period before the Reform of 2003 could look forward to an "investigation" lasting, on the average, about five and a half months. Many lasted for years. Some Special Agents confessed a bias against closing investigations under the old regime, noting that they feared consumer complaints over the lack of result and hoped that future complaints against the same business would cause a disgorging of consumer restitution. In other words, the heavy emphasis placed upon consumer restitution and consumer satisfaction operated against concerns of due process and against the interests of the businesses targeted by complaint-filing consumers.

These letterhead-driven investigations were usually begun within weeks of receipt of the complaint, at which time the consumer's complaint was sent to the merchant for review and response. Very little substantive review was afforded the consumer's complaint before the merchant received a form letter stating that an investigative file had been opened and that a copy of the sometimes illegible consumer complaint was enclosed. Assistant Attorney Generals spoke of many instances in which a file was brought to them that had been opened for more than a year. In those cases it was not uncommon to find that multiple letters had been sent out, despite the file lacking this **one crucial element** -- any semblance of a nexus to the Consumer Protection Act. In other words, under the previous system the lack of any substantive review early in the process, coupled with the dedication to "investigate" (through form letters) almost every complaint tendered caused the Division to approach many merchants with complaints that could not, under any set of facts, add up to the allegation of a KCPA violation.

Some will find a governmental program so designed and sending out investigatory demand letters more than (conservatively speaking) 4,000 times a year (77 times a week, 15 times each business day) of little concern.[9] Attorney General Phill Kline and the author of this report are not among that number. It is most unlikely that those merchants forced to answer a rather trivial complaint that arrived at their business on letterhead from the Office of the Chief Law Enforcer of the State of Kansas are among those who would count such arguably unconstitutional acts of little concern.

The Limits Inherent in the KCPA Were Not Respected Prior to the Reform of 2003

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[9] This statistic is arrived at through consideration of the number of complaints seemingly pre-empted by the Reforms of 2003 and the likelihood, based upon Divisional records, that more than half of those complaints would not have contained a credible allegation of a KCPA violation.

These oft-repeated *ultra vires* acts are crucial to understanding the Reform of 2003. A proper view of the governmental powers inherent in the office of Attorney General is that even a duly elected Attorney General does not have the ability to write any resident of the State and demand that they write him or her back simply because such a demand is made. When commerce is at issue, it is only the presence of a viable KCPA violation that grants the Consumer Protection Division jurisdiction to contact a supplier in the first instance. According to the very Act that created the Consumer Protection Division,

> If, by the attorney general's own inquiry or as a result of complaints, the attorney general has reason to believe that a supplier **has engaged in or is about to engage in an act or practice that violates this act**, the attorney general, or any deputy attorney general or assistant attorney general, may administer oaths and affirmations, subpoena witnesses or matter and collect evidence.

K.S.A. 50-631(a).

The KCPA nowhere enables Kansas' Attorney General to investigate any and every run-of-the-mill commercial transaction brought to his attention or to operate a mediation clinic that emulates the very function undertaken in the private sphere by the Better Business Bureau. Due process and the rule of law mandate that the attorneys of the Consumer Protection Division should be able to articulate a reasoned belief that the KCPA has been violated before merchants are forced to answer letters of demand.[10]

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[10] Consumer protection divisions the nation over tout their *status quo ante* supporting programs designed to maximize consumer restitution as ones dealing out "firm but fair enforcement" of KCPA-like statutes. There is nothing fair about forced mediation of the kind found throughout the pre-2003 files of the Consumer Protection Division. **Mediation, according to Black's Law Dictionary, is a "private, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision upon the parties."** Such is the important role that the BBB or a small claims court judge plays when commercial transactions go awry. The Consumer Protection Division was neither chartered nor armed to play the role of "private" and "neutral" arbitrator between merchants and consumers. This Division is not private and it is not neutral. It is a governmental agency attached to the Chief Law Enforcer of Kansas that is statutorily endowed with an almost unchecked subpoena power and the directive to investigate and take enforcement action against only "suppliers." Merchants who file complaints against consumers (some do) can gain no traction in this Division, for this Division is granted no jurisdiction over consumers who do wrong. The prohibitions of the KCPA flow only one way. Thus the merchant subjected to "mediation" over a complaint that contains no nexus to the KCPA is put in a position similar to a delinquent taxpayer hailed into "mediation" with the Department of Revenue. The question is not the direction the monies will flow, the question is only how much money will flow. As the McDonalds example presented herein demonstrates, even Missouri residents were given latitude to dictate terms to

This jurisdictional check upon the power of the "nanny state" was nonexistent in the Consumer Protection Division in the years prior to the reforms documented herein. As the five examples below demonstrate, the Division was more than ready to investigate law abiding businesses through letters printed on official letterhead for the most trivial of reasons.

The five cases briefed below are representative of a multitude of files worked prior to the Reform of 2003. Many Kansas businesses have rather humorous stories to tell about the spurious nature of complaints received from the Consumer Protection Division prior to our reorganization in 2003. Some can testify that merely ignoring mailed complaints (that should have never been acted upon by the Attorney General's Office in the first place) caused them many more problems than the initial complaints ever could have generated. Of greater concern from an economic perspective, some businesses can testify as to having to pay attorney fees to respond to letters and investigations that arose out of complaints that did not, either on their face or after investigation, reveal any connection to the Consumer Protection Act. This is worthy of repeating. Since the Division seemingly did not care whether the complaints it investigated sounded under the very law that the Division was suppose to enforce, and instead took the approach of investigating nearly every complaint tendered to it, businesses were burdened with the dead weight of responding to even the sometimes vacuous demands of the Office of the Attorney General.

It can be argued that such foundationless investigations constituted due process violations, since legitimate, law abiding businesses were forced to expend monies responding to a government probe (*i.e.* fishing expedition) that lacked a predicate to exist under the law.

The author of this memo is happy to report that this fishing license has now been invalidated.

An additional invalidated longstanding practice took place on the telephone. Prior to the Reform of 2003, it was standard practice to report the number of closed complaints in the Divisional database to any caller. This process allowed suppliers to direct prospective customers toward the Division to receive an immediate report of the sheer number of complaints filed against their competition. In certain instances callers were then informed of complaints that lacked merit under the KCPA. Such a reporting of all complaints, regardless of merit, at the direction of the competition smacks of a violation of K.S.A. 50-626 (b)(1)(G). Thus it is likely that the Division, under the previous reporting policy, was an active participant in acts violative of the KCPA. Beyond involving the Division in the broadcasting of quite dubious information, this policy and practice also offended the spirit and rules of the Kansas Open Records Act. A caller who requests the same information

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Kansas companies that had done no wrong under the pre-2003 mediation-driven process. None of the five examples presented herein are fair, but all are do exhibit an unconscionable dose of unconstitutional firmness.

after the Reform of 2003 is directed to the following Consumer Information Line recordings: (785) 296-2424, category 2, message 3 and category 2, message 8. There the caller is informed that the Division no longer reports on the sheer number of complaints received against a company in response to a telephone call, for good reason, and the caller is informed on how he or she can present a legitimate KORA request.

Overreaching plagued the Division prior to the Reform of 2003. The following five examples from the years just prior to the reorganization of 2003 more than demonstrate this overreaching, and especially as it affected Kansas businesses.

OVERREACHING EXAMPLE ONE

Consumer file 2002-3913
Damages claimed: $5.00
Date closed: 8/9/02

Consumer tendered a complaint that an order of four 99 cent chicken sandwiches *without* mayonnaise resulted in tender of four 99 cent chicken sandwiches *with* mayonnaise. Complaint was assigned to a Special Agent of the Consumer Division for investigation.[11] The Agent followed protocol and sent a letter thanking the consumer for filing the complaint and noting that it was being investigated. The Special Agent then sent a form letter from the Consumer Protection Division to McDonalds notifying them of an investigation of the claim. The letter was unanswered. The Special Agent then sent an additional letter to McDonalds. McDonalds then awarded the consumer a $5 refund, two "give us another chance to serve you" certificates of unknown worth and a heartfelt apology.

The Special Agent then sent the award to the consumer, claimed $5 in consumer restitution and closed the file.

Postscript: This same consumer filed about a dozen other complaints with the Consumer Protection Division prior to 2003. All were investigated, all resulted in letters going to

[11] All of the letters described herein were signed by "Special Agents of the Office of the Attorney General" and sent on letterhead stationary bearing the seal of the Office and the name of the Attorney General. In 2003 it was decided that "Consumer Investigator" better identified those who investigated the complaints in the Consumer Protection and Antitrust Division. This was in deference to the Special Agents of the KBI, since our Division's jurisdiction was civil, not criminal, and since none of the investigators working in our Division were certified law enforcement officers. A grandfathering of those previously titled Special Agent yet results in some employing that moniker, but all of the investigators brought on after the Reform of 2003 are ordered to identify themselves as "Consumer Investigators," as do their badges.

suppliers (including KU ticket sales and Burger King).[12]

OVERREACHING EXAMPLE TWO

Consumer file 2001-3813
Damages claimed: $25.00
Date closed: 12/17/01

Consumer tendered complaint stating that Kentucky Fried Chicken in Gardner took 40 minutes to prepare a 12 piece dinner with two sides. Consumer had also filed complaints with the BBB and the Gardner Chamber of Commerce. The complaint was assigned to a Special Agent of the Consumer Protection Division for investigation. A letter acknowledging this was sent to the consumer. Consumer's filing generated no less than five (5) additional letters in the Consumer Protection Division. The final letter to KFC noted that an Assistant Attorney General had reviewed the file and was poised to file litigation seeking $5000 in fines pursuant to the Kansas Consumer Protection Act – for failing to respond to the office, and presumably, for taking 40 minutes to fry up two chickens. A letter then issued from the franchise office in Springfield, Missouri to the Division with a $25 gift card for the inconvenienced consumer.

The Special Agent sent this award onto the consumer, claimed $25 in "consumer restitution" and closed the file.

OVERREACHING EXAMPLE THREE

Consumer file 2001-2144
Damages claimed: $0.00
Date closed: 5/31/01

Consumer bought a bra at Walmart. The register rang it up at $19 instead of the sale price of $12. The cashier caught the error and immediately voided and re-rang the bra at the cash register. Consumer mistakenly thought she was charged tax twice, so went to the customer service desk where they explained to her that she did not get overcharged. She alleged that the Walmart service desk personnel were rude to her and so she filed a complaint with the Consumer Protection Division. The rudeness-alleging complaint was assigned to a Special Agent of the Consumer Division for investigation. The Special Agent

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[12] The Reform of 2003 has now made it common (upon receipt of a complaint of the spurious nature of those briefed above) to check the Divisional database for similar complaints from the same consumer. It is not uncommon to discover that the database contains multiple other complaints from the same consumer, usually of similar merit. Almost all such complaints resulted in mailings to the businesses named in the complaint prior to the Reform of 2003. The Division has noted a decrease in filings by these frequent complainers in the past years.

wrote two letters. The first letter thanked the consumer for filing the complaint and advised her that she might want to consider small claims court or obtaining private counsel while the complaint was under investigation. (The allegation of rudeness was not of a nature that could support a suit alleging the intentional affliction of emotional harm or any other such tort, so how it could be addressed in those venues is unknown.) An additional letter was sent to Walmart's corporate office in Bentonville, Arkansas, letting them know that the complaint was being investigated as a potential violation of the Kansas Consumer Protection Act. The letter to Walmart's corporate headquarters actually asked them to "provide the consumer the relief requested" and answer in writing, as was the boilerplate language in most of the letters sent out by the Consumer Protection Division. An assistant to the Director of Customer Relations sent a kind letter back to the Office of the Attorney General and the consumer, sincerely apologizing to the consumer and tendering a $5 gift certificate to compensate.

The Special Agent sent this award onto the consumer, claimed $5 in "consumer restitution" and closed the file.

OVERREACHING EXAMPLE FOUR

Consumer File 2001-7019
Damages claimed: $10.00
Date closed: 1/16/02

Consumer received a curtain rod from Target as a gift. It was too long, and the consumer had no receipt. Target refused to take the rod back or exchange the rod. The consumer took five minutes to fill out a complaint form, send it to the Consumer Protection Division, and a Special Agent of the Office of the Kansas Attorney General then wrote three letters in response. The letter to Target asked the retailer to "provide the relief requested" and to respond in writing within two weeks. The file contains no evidence that an attorney reviewed the file and no evidence of a violation of the Kansas Consumer Protection Act. The Division was investigating a case in which the merchant was accused of refusing to refund or exchange an item when the consumer could produce no receipt proving the item was bought at that location or even from that retailer in the first place. The rod, in fact, could have been bought on the internet, purchased at a garage sale or even stolen. Nevertheless, the letter from the Attorney General had the intended effect. Target not only acted upon the consumer's individual complaint, Target even changed its policy since the Attorney General so requested. The Consumer was allowed an exchange and now all similarly situated consumers are also allowed an exchange.

The Special Agent notified the consumer of this opportunity to exchange, claimed $10 in "consumer restitution" and closed the file.

OVERREACHING EXAMPLE FIVE

Consumer File 2002-1934
Damages claimed: 37 cents per day for life
Date closed: 6/12/02

A Missouri consumer complained that he had paid $3 for an "everlasting mug" from McDonalds in 1999 and that this $3 purchase was supposed to entitle him to free coffee for life. He was incensed that the Overland Park McDonalds insisted on charging him 37 cents for each fill up. His complaint moved the Consumer Protection Division to immediately issue two letters, one back to him thanking him for the complaint and one to the Overland Park McDonalds. McDonalds did not answer and so a second letter was sent to them. When McDonalds had not answered either demand letter within 60 days a Special Agent of the Office of the Kansas Attorney General sent a third letter, via overnight express mail, which included a threat to "issue a subpoena requiring your appearance or resort to other legal process" if the supplier continued to ignore the Office of the Attorney General of Kansas. This threat to issue legal process finally moved McDonalds to action. The Kansas and Missouri Operations Manager offered the Freeman, MO resident $100 in gift certificates to be used to fill up his $3 coffee cup, even though McDonalds still denied having any knowledge of any such "free coffee" campaign and perceived no legal obligation to the Missouri resident. Convinced that the Office of the Attorney General was standing with him, the consumer boldly refused that offer as insufficient. The Consumer Protection Division Special Agent and Assistant Attorney General working this case thus rejected that offer as insufficient. On May 15, 2002, Jill A. Cameron of the U.S. Legal Dept. for McDonalds Corporate (located in Oak Brook, Illinois) then delivered, via airborne express, a letter to the Assistant Attorney General that doubled the offer. The offer had become $200 in McDonalds gift certificates, enough to buy, by McDonalds's reckoning, 364 free coffees at retail. (This is 540 cups at 37 cents per cup.)

The Special Agent sent this award onto the Missouri resident (who yet presented no evidence of a Kansas transaction falling under the rubrics of the KCPA), claimed $200 in "consumer restitution" and closed the file as a successful mediation. (The author of this memo doubts that McDonalds Corporate viewed it as positively resolved.)

Analysis of the Five Examples

These examples were not difficult to locate in the Division's archives. A search of a few fast food and big box store complaints brought them to the fore with little effort. Those who worked in the Division prior to the Reform of 2003 assure the author of this memo that these are typical of hundreds, and even thousands of complaints in the Consumer database.

A takings clause (*i.e.*, constitutional) analysis of these five examples would raise troubling questions. In each instance the "nanny state" is found demanding that a legitimate business

expend time and resources answering to a complaint that could not have been pled as a KCPA violation given the demands of K.S.A. 60-211. No private attorney would have taken these cases forward. Few of the complaining consumers would have deemed their concerns worthy enough to docket in small claims court, and none of the above five could be dubbed *prima facia* cases in that venue. The BBB would have found most of the above unresolvable. But prior to the Reform of 2003, none of these options were necessary when such transactional problems arose. One had to only request an investigation by taking five minutes to fill out a consumer complaint form, get the same to the Office of the Consumer Protection Division, and the Attorney General of the State of Kansas would take up the offense, shoot out a form letter, and usually deliver "restitution" to the allegedly harmed constituent (consumer).[13]

Sampling and interviews suggest that thousands (perhaps tens of thousands) of the complaints that the previous administration acted upon could be characterized as ones in which a consumer advanced poorly evidenced allegations against a Kansas company with no history in the Consumer Protection Division's database while seeking less than $200 in damages. Any meaningful review of the past cases would reveal that much of the "consumer restitution" claimed under the now-replaced paradigm was as tenuous as the examples set forth above.

Three of the above complaints seek less than $10 in damages for grievances that simply have no relationship to the KCPA. Such complaints should not, ideally, move the Attorney General of the State of Kansas to any action. They almost always did under the previous administration. Seasoned investigators report that even complaints of less than a dollar resulted in letters to suppliers prior to the Reform of 2003.

A Question of How Much is Enough to Justify the Marshaling of State Resources

The Consumer database clearly records the result of the Reform of 2003 as related to complaints asking the State to expend more monies in mediation that the aggrieved consumer can identify as a loss. Consider the number of complaints investigated that claimed $10 or less in damages:

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[13] Each of these cases, if presented under the 2003 reformed rules of engagement, would result in one form letter back to the consumer recommending problem solving alternative to state intervention and a packet of educational material designed to aid the consumer in the sharpening of his or her problem solving skills and understanding of the serious role that the Division is called to play in Kansas commerce. The costs for sending this form letter and educational material are minimal. Such educational material has been mailed out to no fewer than 8,000 Kansas households since the Reform of 2003. Less involved educational mailings have been sent to no fewer than 20,000 Kansas households. No such programs existed prior to 2003. These mailings have been received by households that formerly tendered multiple complaints to the Division, with "consumer restitution" being the likely result.

Year	Number of complaints investigated claiming less than $10 in damages
2000	88
2001	58
2002	61
2003	Transition
2004	15
2005:	2

It cannot be said that every complaint tendered to the Consumer Protection Division stating damages of $10 or less is frivolous. Some are raising legitimate concerns regarding billing issues or scams designed to take less than $10. This explains the few post 2003 complaints alleging under $10 were actually investigated. Most of the complaints stating damages for less than $10 would have the taxpayers expend many times more than that amount to recover the aggrieved consumer's losses.[14] They not only offend common sense and responsible management principles, they offend the dignity of a statewide constitutional office that is entrusted with letterhead bearing the seal of the State of Kansas. Moreover, such conduct is potentially violative of the very oath that every Kansas attorney pledges in order to become licensed to practice law. Such oath swearing binds an attorney to pledge allegiance to the Constitution of the United States and to the State of Kansas and to not "knowingly foster, or promote, or give ascent to any fraudulent, groundless or unjust suit".

More than a few of the five examples set forth above could be adjudged as the fostering of such suits. At least one AAG confessed to being troubled by this *spectre* prior to the Reform of 2003.

THE 2003 REFORM OF THE INVESTIGATORY AND ENFORCEMENT PROCEDURES AND POLICIES

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[14] Standard practice prior to the Reform of 2003 caused such complaints to generate a letter to the consumer and a letter to the merchant and copying costs, at a minimum, along with the internal file creation. The Reform of 2003 resulted in the letter to the merchant and the copying costs being dropped when the complaint was one for $10 or less. While the Division has not quantified the cost of sending a letter to a merchant, it likely costs the taxpayers much more than $10. Since the great majority of such complaints lack a nexus under the KCPA, the cost that such "investigatory" letters shifted onto the merchants is also, in most instances, quite unjustifiable and an unwelcome burden upon Kansas commerce.

A New Management Paradigm for the Division

The Division met for a series of training sessions in the Spring of 2003. Those sessions addressed existing concerns in the Division and the statutory purpose of the Consumer Protection and Antitrust Division. Using a collaborative management paradigm, the team worked with General Kline's mission statement of "Promoting human dignity through justice with compassion and professional excellence" to come up with the following application of the same to the Consumer Protection function:

PHILOSOPHY AND MISSION STATEMENT OF ATTORNEY GENERAL PHILL KLINE'S CONSUMER PROTECTION/ANTITRUST DIVISION

The Consumer Protection/Antitrust Division strives to promote human dignity through justice with compassion by carrying out its statutory duties under the KCPA with professional excellence and judicious restraint.

- *The Division exists to promote healthy commerce by investigating and taking enforcement action against deceptive, unconscionable and anti-competitive business practices.*
- *The Division strives to minimize the need for such investigations and enforcement action by educating consumers, suppliers and business leaders.*
- *When enforcement action must be taken, the Division vigorously prosecutes violators of the KCPA toward the goal of developing a body of case law that protects Kansans from unscrupulous business practices.*

A Foundational Change in How Consumer Complaints are Distributed and A Structural Change in How the Decision is Made to Require that a Merchant Answer a Consumer Complaint

The reforms of the policies and procedures of the Consumer Protection and Antitrust Division that have been put in place at the insistence of the current Attorney General have significantly altered the pre-existing *status quo ante*. The most significant changes are twofold, one affecting consumer education and the other affecting investigatory practices:

(1) AGGRESSIVE CONSUMER EDUCATION INITIATIVES: No consumer receives a complaint form without, at the same time, receiving a letter explaining the mission and jurisdictional limits of the Consumer Protection Division. A copy of that letter is attached to this report. That letter is accompanied by the Division's 2003-produced brochure entitled "10 Steps to Resolving Disputes with Merchants." This new, improved and educational "complaint packet" and a change in how telephone inquiries are processed are the likely causes for the 50% reduction in complaints

tendered to the Consumer Protection Division. This change in the level of consumer education undertaken prior to the filing of a complaint is a dramatic shift from the policies of the previous administration.

As stated, the telephone interface with the public was also changed in the Reform of 2003. Prior to the reform, the primary goal of the receptionist was to send a complaint form (*sans* any consumer educational material) to the caller. This made sense at that time, as it furthered the primary Divisional goal of increasing complaint filings.[15] With the Reform of 2003, the telephone receptionists became more actively involved in consumer educational efforts. Instead of automatically inviting the filing of a complaint, they were instructed to direct callers toward the most applicable problem solving agency or activity. A new tool in consumer education was put in place to ensure that callers received consistent and accurate problem solving advice in response to frequently asked questions. That tool is the 64 pre-recorded messages managed on the Consumer Information Line, which can be audited by dialing (785) 296-2424. These prerecorded messages, which are grouped into eight categories, cover a multitude of legal, procedural and problem solving areas with all content being authorized by the Division Chief. The policies and procedures of the Division are detailed in the first four messages recorded in category two. The philosophical underpinnings of the Reform of 2003 is recorded as message eight of category seven.

The messages recorded in the Consumer Information Line are changed as necessary to reflect demand. The message center is also used as part of the training in the Division, and all personnel are required to listen to all 64 messages as part and parcel of their orientation.

This serious and substantive commitment to consumer education is one of the most important byproducts of the Reform of 2003. It has had a dramatic effect upon the

number of complaints filed by advising consumers to exhaust alternative problem solving remedies before seeking the aid of the government.

(2) JUDICIOUS RESTRAINT AS TO INVESTIGATIONS: No merchant receives a letter

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[15] For the same reason complaint forms (again *sans* any letter of explanation) were liberally distributed at every speech, most all events occurring outside of the office and at the State Fair. Such a methodology resulted in the filing of many "impulse" complaints, in which a filing with the Division was the first step in problem solving activity by the consumer. The Reform of 2003 ended these practices, and consumer educational materials, rather than complaint forms, are liberally distributed by the post-Reform Division. *See, e.g.*, the educational materials included in the appendix of this Annual Report.

from Attorney General Phill Kline's Consumer Protection Division until and unless an Assistant Attorney General has approved such contact in writing. An AAG can approve such contact only after initially determining that he or she has "reason to believe that a [merchant] has engaged in or is about to engage in an act or practice that violates this act." K.S.A. 50-631(a). In other words, when the post-reform Division contacts a merchant regarding an "investigation" it is only after probable cause for an investigation has been reduced to writing. The post reform Division does not conduct fishing expeditions or attempt to displace the BBB and function as mediation teams just because someone has filed a complaint with the Office of the Attorney General.

This serious and substantive commitment to investigate only viable allegations of unlawful acts falling within the jurisdiction of the Division is one of the most important byproducts of the Reform of 2003. It has had a dramatic effect upon the number of contacts this Division makes with businesses, and allowed the Division to focus its efforts and energies upon those businesses that most deserve the attention of the Office of the Attorney General.

These substantial changes in the processing of consumer complaints and the procedures employed to process the same are the result of our Incoming Review Committee (IRC). This Committee did not exist prior to 2003. A more thorough understanding of how that important committee functions is necessary to appreciate how it serves to check the previously unchecked power of the Division.

The Change in How Written Complaints are Processed

The policies and procedures that define the IRC cause written complaints to be handled in a far different fashion than during previous administrations. In the previous administration, complaints were received by a lead Special Agent, who merely identified the category under which they were to be processed and then tendered them to the Special Agent working that category. This assignment was undertaken without the benefit of review by an Assistant Attorney General.[16] The investigating Special Agent then sent the complaint directly to the business for a response in most instances, asking the business

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[16] One great frustration expressed by Agents and AAG's during the interviews that preceded the Reform of 2003 was that key personnel investigating consumer complaints received very little training addressing the legal limits or requirements of the KCPA. These same former investigators and attorneys alleged that no meaningful review, let alone legal analysis, occurred before a complaint letter announcing an "investigation" was sent to a supplier prior to the Reform of 2003. The IRC and Consumer Information Line have addressed both of these concerns by facilitating training and coordinating internal communications on the crucial topics of policies, procedures and philosophy.

to either remedy the situation or respond to the allegations. These formerly utilized processes and procedures differ little, if at all, from those employed by the Better Business Bureau.

Please consult the flow chart (enclosed in the appendix) to understand the next few paragraphs. The flow chart and following paragraphs detail the policies and procedures that govern the reformed investigatory function.

Once a consumer complaint is received in the office it is reviewed by a committee made up of no less than three individuals. Upon receipt, Divisional support staff personnel fill out a work sheet and check our extensive database to determine if we have received prior complaints against the supplier. This information is recorded on the work sheet for the complaint. The support staff also scour the complaint to determine if the complainant falls into any categories that we track through our "vulnerable adults task force." We added these categories and many additional fields of inquiry to the basic complaint form during our 2003 reorganization. A sample complaint form is included in the appendix of this report.

The complaint and work sheet are then sent into a conference room specially appointed for the processing of incoming complaints.[17] In that room a rotating team of investigators and Assistant Attorneys Generals meet (each morning) to review the recently received complaints. The goal of this second review is to weigh the merits of the complaint against the backdrop of the KCPA and determine if an investigation should be opened. It is, in essence, a determination as to whether an allegation that a Kansas law policed by the Consumer Protection Division can be found within the consumer's complaint. In many cases it is determined that the complaint does not present a situation best addressed through investigation. In those cases the reviewing team promptly communicates the best problem solving advice available. This advice is selected from a well researched collection of more than 34 form letters, any of which can be edited to make a particular point. The Division prides itself on the quality of the problem solving advice communicated through the IRC process.

A copy of the current Incoming Review Evaluation Form is included in the appendix of this report. Note that the bottom of that form is a matrix to guide the reviewing team in weighing

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[17] This conference room is appointed with myriad consumer problem solving resources, allowing the reviewing team the ability to best advise the complaining party. Our mission statement is also prominent in the room, along with the following inspirational quote from the esteemed jurist Louis D. Brandeis' dissenting opinion in *United States v. Olmstead*, 277 U.S. 438, 479 (1925):

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficial.... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

the harm that the complaint documents. This "specific harm" analysis is further explained in one of the more than twenty standard operating procedures (SOP) that have been drafted to define the operation of the Consumer Protection Division since the 2003 reforms. These SOP's are available upon request.

If the consumer is identified as a Vulnerable Adult then the complaint is processed with a deference toward opening an investigation. The more vulnerable the complainant, the more deferential the review. All files that are identified as "vulnerable" are tracked as such in our database, allowing separate statistical analysis of the complaints coming from vulnerable adults. Such tagging of the vulnerable adults cases was not done prior to 2003. Such tagging allows investigators to quickly identify merchants that are targeting vulnerable adults.[18]

The following is a crucial and key difference between the system that existed before 2003 and the system that exists after the Reform of 2003: If the consumer's complaint does not allege a deceptive or unconscionable act cognizable under the Consumer Protection Act then the complaint is processed during this initial review, and ***does not*** result in the business being contacted by the Office of Attorney General. In such instances the consumers receive the best possible advice from the reviewing team, advice for which we have received multiple thank you letters.

Had the Division been operated under the same policies and procedures in the past four years as had been used in the four years previous to that, approximately 20,000 contacts with merchants would have been made on behalf of complaining consumers that were **not** made due to the Reform of 2003. Most all of these contacts would have been unjustifiable under the KCPA, and would have constituted the Office of Attorney General shifting a "mediation" burden upon businesses that was, in most instances, unwelcome and unconstitutional.

Assuming that each such unsent letter would have caused the wrongly contacted merchant to expend an average of $200 in responding, either due to communication costs, attorney fees, lost time or an undeserved disgorging of restitution, then the Reform of 2003 has saved not only the dignity of a constitutional office, but has also saved businesses, the bulk of them Kansas businesses, approximately four million ($4,000,000) dollars.

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[18] IRC personnel are also encouraged to make immediate telephonic contact with vulnerable adults or any other complainants when an emergency situation presents at this stage in the review process. For example, those who can mount credit card challenges to consumer transactions are often called and directed to listen to the recording at (785)296-2424, category 3, message 4. Vulnerable adults that appear to be targets of con artists are also promptly contacted by Division personnel.

This is a commerce friendly philosophy, as is befitting a state that highly values honest commerce.

Investigations are Reserved for Complaints Alleging a Violation of the KCPA

If the complaint processed through the IRC contains a credible allegation of a KCPA violation (*i.e.* deceptive or unconscionable act and a consumer transaction) or other law policed by this Division (such as antitrust, cemetery, unauthorized practice or charitable solicitation) then it is slated for further review by a Consumer Investigator and Assistant Attorney General. This third review constitutes the beginning of an official investigation. In some instances the third review results in phone calls that resolve the issue. In other instances letters are sent out. When the allegations are of a kind that cause the Assistant or Deputy Attorney General concern as to the preservation of evidence or shading of testimony, the full impact of the statutory tools are brought to bear. In other words, the Divisional attorneys are not shy to act as directed by the Legislature and to "administer oaths and affirmations, subpoena witnesses or matter and collect evidence," as is our duty pursuant to K.S.A. 50-631(a). We take such formal steps only when an enforcement action appears justified on the face of the complaint. We take such formal steps more frequently after the Reform of 2003 than was done before the reform. In other words, our investigations are more hard hitting after the Reform, and now involve less letter writing and more subpoena letting.

We refer to the second review as the IRC (Incoming Review Committee) review and the third as "assignment." Once again, previous administrations had only the assignment, and most, if not all, of the complaints resulted in a letter to the supplier. A letter which, at least hypothetically, caused the supplier to expend time and possibly even attorneys fees responding to a complaint that far too often lacked warrant under the KCPA.

Conclusion

This concludes the description of the restructuring and reform of the procedures and policies of the Consumer Protection and Antitrust Division in 2003. It is my belief that these positive changes to the procedures and polices of the Division fulfilled the mandate that General Kline communicated to me when he placed the Division under my charge. That mandate was to ensure that:

1. The Division was dedicated to promoting human dignity through justice with compassion and professional excellence.
2. The Division never engaged in extortion or misuse the power of the office to achieve an unjust result, regardless of who was served by such means.
3. The Division identified and served the most vulnerable Kansans, especially those vulnerable due to advanced years or medical conditions.

4. The Division granted the most vulnerable Kansans a preference when investigating consumer cases.
5. The Division was recreated with a management system in which each public interface was governed by protocols to ensure professionalism
6. The Division was recreated with a management system in which due process rights were respected.
7. The Division was recreated with a management system generating rapid, accurate, brief responses.

The following statistics are offered as evidence that the Reform of 2003 has been both positive and successful.

STATISTICAL ANALYSIS AND COMMENTARY ON TRENDS IN DIVISIONAL OUTPUTS

Seven Year Statistical Trend Analysis on File Processing Time

Table A

The following chart is the result of statistical sampling of the Consumer database. While the samples were large enough to satisfy the demands of the Central Limit Theorem, this data is not put forth with a 99% confidence level. That being said, the trend it presents is beyond cavil.

Year	Most days file open	Average days file open
2000	1065	173
2001	841	148
2002	667	187
Transition	Transition	
2004	470	76
2005	210	33
2006	279	43

- These statistics reveal that the Division has significantly reduced the amount of time cases remain open.
- The general drop in case load as a result of the Reform of 2003 follows a similar trajectory.
- This significant drop in file processing is a byproduct of the streamlined intake procedures and a requirement that investigators report, each month, on cases that are older than 3, 6, and 12 months.
- The new IRC procedures are currently responding to consumers with

either a letter of sound advice and consumer education or a post card notifying the consumer that the case has been assigned for investigation within 20 calendar days of receipt of the complaint.

- Cases identified as necessitating a challenge against a credit card or other escrow service result in immediate contact with the consumer via letter or telephone.

The above analysis satisfies General Kline's directive that the management system deployed in the Division "generate rapid ... responses." The following statistical measures further demonstrate the success of the Reform of 2003 in implementing the directives that opened this report.

Seven Year Statistical Trend Analysis on Revenue Sources and Multistate Litigation Efforts

As detailed in the foregoing text, multistate recoveries have historically funded the Division. The following analysis of income coming into the Division reveals the extent to which this has been the case since 2000. These are recoveries that are placed into the general fund as actual dollars. They are thus monies used to underwrite the cost of the Consumer Protection and Antitrust Division, these are not "consumer restitution" dollars that are routinely reported in the Annual Reports.

"M Recoveries" are the multistate recoveries. "K Recoveries" are those recoveries that begin and end in Kansas. Most of the multistate recoveries begin with NAAG and are monies bestowed upon Kansas merely by virtue of the State having a Consumer Protection and Antitrust Division – regardless of who stands at the helm. In some instances Divisional personnel play a role in the multistate process, but in most instances the role is minor, at best. The multistate actions are primarily managed by NAAG personnel and the large, institutionalized Consumer Protection Divisions of the most populous states.

Table B

(Fiscal year analysis)

A STUDY OF CONSUMER PROTECTION DIVISION INCOME, 2000-2006

M – MULTISTATE (NAAG INITIATED) LITIGATION

K – KANSAS OFFICE INITIATED LITIGATION

Year	Total Recoveries	M Recoveries	K Recoveries	No Call
2000	$1229k	$889k	$340k	--
2001	$1428k	$144k	$1284k	--

2002	$402k	$198k	$204k		--
2003	$1639k	$824k	$639k	+	$176k
2004	$764k	$473k	$159k	-	$132k
2005	$494k	$156k	$303k	+	$34k
2006	$1103k	$361k	$737k	+	$5k
Averages	$1008k	$435k	$524k		$87k

Table B tracks nonrestitution dollars brought in through Multistate and in office actions. These are monies that are deposited in the state general fund and used to operate the Consumer Protection Division.

Analysis of this data reveals the following:

- FY 2002 (July 1, 2001 - June 30, 2002) was the low water mark of the past seven years as to operational monies received through enforcement actions.
- Recoveries from multistate actions ebb and flow. The current two year period suggests that multistate recoveries are currently waning.
- No Call revenues have dropped off precipitously since the National No Call law was enacted.
- If No Call recoveries are added into the in office actions, as they should be, then FY 2002 is revealed as the low water mark of the past seven years as to civil penalties and fines recovery, in terms of both multistate and in office recoveries.
- The Consumer Protection Division of FY 2006 brought in total recoveries $218,000 above the seven year average, multistate recoveries $74,000 below the seven year average, and in office recoveries $95,000 above the seven year average.
- These FY 2006 statistics demonstrate, as do others found herein, that the Reform of 2003 visited positive economic benefits upon the Division as a whole.

Table C

An analysis of the fourteen top generating income dollar (to the state) cases of past seven years reveals the degree to which multistate actions (in **bold** with an M) account for the Consumer Protection Division's budget:

Case	Year	Income		Source
Knoll Pharmaceutical (Synthoid)	**2000**	**$834k**	**M**	
Bridgestone/Firestone	**2003**	**$528k**	**M**	
Qwest Communications & LCI	2001	$350k		K
Collingwood Grain	2001	$325k		K
Ford Motor	**2003**	**$300k**	**M**	
Warner-Lambert	**2004**	**$185k**	**M**	
Southwestern Bell	2006	$175k		K
Fleming	2001	$140k		K
Pfizer	**2003**	**$127k**	**M**	
Publisher's Clearing House	**2006**	**$111k**	**M**	
Wireless Multistate	**2005**	**$107k**	**M**	
Direct TV	**2006**	**$100k**	**M**	
Reed Freeman	2003	$100k		K
Kohl's Dept. Stores	2001	$100k		K
Total		$3462k		

- Of the $3462k recovered in these top 14 cases of the past seven years, $2292k, or 66% of the money, arose out of multistate actions.
- Of the above referenced multistate actions, Kansas, like most of the smaller states, usually plays little more than a *de minimis* role in the process.
- The above income-generation statistics, an understanding of which is crucial to the planning of the future of the Division, have never before been included in an Annual Report.

Table D

An analysis of trend in big dollar recoveries, analyzing largest cases for Kansas, reveals that the size of the recoveries (multistate or otherwise) is waning:

	# cases	Total dollars	Source
2000	1	$843k	M
2001	4	$915k	K
2002	0	$0	
2003	4	$1055k	90% M
2004	1	$185	M
2005	1	$100	M
2006	3	$386	54% M

- This trend analysis of top income producers reveals that huge dollar multistates have been the cause of the primary influx of monies into the Consumer Protection and Antitrust Division.
- Trend analysis reveals that years 2000 - 2003 put approximately $1, 700,000 into the CPD from such sources, but that 2004 - 2006 have yielded less than $500k from this formerly lucrative multistate source.

The above analysis could simply demonstrate the ebb and flow of multistate actions. Alternatively, it could be that the era of large multistate settlements is drawing to a close. A recent multistate settlement with State Farm suggests the latter. That company approached NAAG to self-report commercial acts that were likely to become the focus of a multistate action. State Farm set aside monies for consumer restitution, took certain steps to ensure that the past problems would not be repeated, and then tendered very little money to NAAG for distribution to the states as income. Kansas was awarded only $15,000. If this portends a trend that will become more common in the future, then the era of large multistate recoveries is indeed waning.

Seven Year Statistical Trend Analysis
on the Filing of Enforcement Actions

Table E

The Consumer Protection Division's statutory charter is found in the KCPA. The Division exists, in essence, to engage in consumer educational efforts, investigate potential violations of the Act, and take enforcement actions when appropriate. There is no warrant for consumer mediation of the kind that was standard practice prior to the reforms of 2003.

The 2003 reform had the predicable result of freeing up more Divisional resources for the above-stated core mission. This freeing up of resources has translated into, *inter alia*, the filing of more enforcement action.

Enforcement Actions Filed (calendar year)

2000	62	
2001	84	
2002	40	
2003	75	
2004	79	
2005	58	
2006	62	(As of October 23, 2006)

- The seven year trend analysis reveals 2002 as the low water mark in enforcement filings.
- The above reveals that more enforcement actions were filed in the first three years of the Kline Administration (212) than in the final three years of the previous administration (186). This trend constitutes a 14% increase in the filing of enforcement actions since the Reform of 2003.

TWENTY YEAR STATISTICAL TREND ANALYSIS
OF "CONSUMER RESTITUTION" RECOVERIES

Total Annual Consumer Savings is the amount of money that consumers gained in restitution through the efforts of the Office of Attorney General. This is the statistic that has

proved most dynamic over the many years that it has been tracked, and it is one of the few monetary statistics prominent in the previous annual reports.

These restitution monies have historically arisen from four actions, ranked herein in order of their proven effectivity at transferring monies into the accounts of Kansas consumers:

1. Multistate litigation in which Kansas joins. (*I.e.*, litigation is filed in some jurisdiction)

2. Multistate settlements without litigation in which Kansas joins. (*I.e.*, no litigation is filed in any jurisdiction)

3. Mediation efforts by the Office of Attorney General on behalf of consumers and adverse to businesses. (*I.e.*, no litigation is filed by the Kansas Attorney General.)

4. Litigation filed by the Kansas Attorney General in Kansas (*I.e.*, litigation is filed by the Kansas Attorney General)

The management philosophy enacted by the Reform of 2003 purposely minimizes 2 and 3 above as sources of restitution, since they are too often based upon the fact that businesses fear the Office of Attorneys General rather than being based upon documented violations of the law. These avenues of wealth transfer have been questioned as to whether they offend basic due process safeguards in periodicals of some esteem.[19] If litigation cannot be filed (at the minimum in the form of a consent judgment) then justice is not served by forcing "nuisance value" settlements upon merchants. Because the Kline Administration has not been involved in such strong arm settlement tactics, and because the Kline Administration has eschewed forced arbitration and intimidation based upon letterhead, and because the "large dollar" multistate actions are currently waning, the amount of monies received from businesses and distributed to Kansas consumers is significantly less in the past years.

Table F

The following twenty year analysis reveals the significant changes of the past three years:

Year	Consumer restitution dollars	Largest single source of restitution

[19] *See* Perspectives on State and Federal Antitrust Enforcement, 53 Duke Law Journal 673 (especially Judge Posner discussion); *see also* Former Nebraska Attorney General Don Stenberg, Avoiding and Settling State Attorney General Lawsuits, Washington Legal Foundation Vol. 19 No. 15 (May 30, 2004)(setting forth strategies for dealing with A.G. offices); *see also* Horizontal Federalism: Exploring Interstate Interactions, Bowman J Public Adm Res Theory, Vol. 14: 535-546 (2004)(for the most scholarly of the three).

2005	$922k	Daimler Chrysler	$38k		K
2004	$681k	Taxol	$208k	M	
2003	$1388k	Ford		$52k	K
2002	$2850k	Pres. Manor		$90k	K
2001	$9300k	Firestone		$3886k	M
2000	$2200k	N.W. Lad		$131k	M
1999	$3800k	Staub, Intl		$174k	K
1998	$2600k	Sears		$778k	M
1997	$2071k	Natl. Tour Assoc.		$100k	M
1996	$1400k	AT&T Corp		$56k	M
1995	$1143k	Wichita RV		$72k	K
1994	$1413k	Bradf'd Home Corp		$80k	K
1993	$1116k	Ag Chem Equip Co		$75k	K
1992	$750k	Sonny Hill Chevy	$18k	K	
1991	$798k	GM Chevrolet	$25k	K	
1990	$1359k	Chrysler		$249k	M
1989	$829k	N.W. Fin. Express	$24k	K	
1988	$14188k	Continental Airlines		$13850k	M
1987	$654k	Carl L. Brown	$36k	K	
1986	$1000k	Regional Invest Co		$110k	K

- Some of the $1388k realized in 2003 was due to actions taken by the previous administration. The most accurate currently available estimate of the reconstituted Division's recovery of consumer restitution per year (without the benefit of multistate recoveries) would be an average of 2004 and 2005, which results in $801k per year.

- This figure purposely excludes a more than $1,000,000 transfer of monies from the accounts of Renaissance, TTP into the accounts of the Attorney General in 2005. This is because these monies were earmarked for consumer restitution, but only $200,000 worth of restitution could be justified based upon the claims made in the applications received. The Division will soon move the court to return $800,000 of these monies to the court accounts, to be distributed from those accounts as is just.

- The two years with the most consumer restitution recovery are 1988 and 2001. The huge recoveries in both of those years were the result of multistate actions directed by NAAG. The 1998 record setting recovery was the result of the fine work of former Attorney General Bob Stephan. The monies so reported did not benefit only Kansans. The 1988 annual report notes that these funds benefitted consumers "in the state and in the nation." Such is often the case in mulitstate recoveries, as that the settlement monies marked for "consumer restitution" must be distributed, and often to nonresidents of Kansas.

- An analysis of the sources of the previous "high dollar" compensations reveals that the bulk of these transfers (that were not mullistate actions) were in the form of contract rescissions on property and vehicles. Most of those

marked "K" above, in other words, were the result of the Division causing the unwinding of a contract.

- From 1996 - 2001 the high dollar consumer restitution most years was a multistate action. These were "fat years" for NAAG, as is reflected on the revenue chart (Table B). It appears that a waning may be in process in these numbers as well. The only multistate tendering significant consumer restitution during the Kline Administration was one targeting a major pharmaceutical manufacturer.

TWENTY YEAR STATISTICAL TREND ANALYSIS OF CONSUMER COMPLAINT FILINGS

The following twenty year analysis reveals the significant changes of the past three years and that the current level of complaints closely approximates the number of complaints received prior to the managerial emphasis of the previous administration:

Table G

Year	Consumer complaints received	Population of Kansas
2005	4308	2,662,616
2004	4391	
2003	5244	
2002	7554	
2001	7891	
2000	8585	2,688,418
1999	7052	
1998	7454	
1997	7714	
1996	5571	2,572,150
1995	data unavailable	
1994	4942	
1993	4508	
1992	4130	
1991	5058	
1990	5342	2,532,394
1989	5175	
1988	5406	2,461,995
1987	4358	
1986	4017	2,432,614

Analysis

- The average number of complaints received in the three years preceding 1995 was around 4500.
- The average number of complaints received in the three years after 1999 was around 8000.

- The average number of complaints received by the Division in 2004 and 2005 was around 4300.
- The population increase in Kansas from 1995 to 2000 was about 3.5%.
- Thus while the population slowly rose 3.5% over a half-decade, the number of complaints received nearly doubled in the same time frame.
- The 1988 annual report attributes a 25% increase in the number of complaints received to the awarding of $14.2 million dollars through multistate enforcement actions.
- The annual reports filed between 1996-2002 reveals the cause of the nearly doubling in the number of consumer complaints filed with the Division. It was a premeditated campaign by the previous administration to increase these numbers.
- This nearly 85% increase in the number of complaints resulted in an increase in "consumer restitution" but no corresponding 85% increase in the filing of enforcement actions or 85% increase in revenue brought in for the operation of the Division.
- This nearly 85% increase in the number of complaints resulted in no appreciable increase in enforcement actions because the Division was involved primarily in mediation efforts.
- The year 2002 was rather the low point for both the filing of enforcement actions and the realizing of actual funds from fines and civil penalties.
- The increase in "consumer restitution" under the previous administration was the result of mediation efforts that were not sanctioned by statute and that may therefore constitute unconstitutional takings and unconscionable acts on the part of the Office of the Attorney General.

Conclusion

The "drop" in consumer complaint filings and restitution numbers under the Kline Administration should be viewed as a mid-course correction for the Division. As such this "slow down" in the transfer of wealth from law-abiding businesses to complaining consumers constitutes statistical proof that the reforms of 2003 have remedied state action

often accused of overreaching due to a seeming anti-business bias. The above data set aptly demonstrates that the reforms of 2003 ended a longstanding practice of investigating legitimate, law abiding businesses under the excuse of "protecting" consumers.

George Washington stated that, "Government, like fire, is a dangerous servant and a terrible master." His keen insights into the proper role of government caused our Founding Father to issue strongly worded cautions to those managing governmental functions, lest mission creep be allowed to grow government too large and well beyond its proper limits.

The Consumer Protection Division was established by an act of the Legislature in 1973. It was given broad powers, including subpoena power, and sent on a mission to confront businesses polluting the stream of commerce in Kansas. Somewhere along the way, based, most likely, on the desire to serve constituents, a bureaucratic mediation unit grew up in the midst of the Division. This history has been repeated in the consumer protection divisions imbedded in attorney general offices across the nation. The result has been a blurring of the original mission and a conflating of the consumer protection function with the Better Business Bureau's mediation model. There must be a difference between the two.

The Reform of 2003 has remedied this myopic and bureaucratic mediation focus in the Consumer Protection Division imbedded within the Office of the Kansas Attorney General. Businesses who actively pollute the stream of commerce in Kansas are not allowed to simply "pay off" consumers (*i.e.* engage in "consumer restitution") and continue down the road conducting business as usual. Such failed policies do nothing save create a revolving door of complainants and forge a symbiotic relationship between the supposed enforcers of the KCPA and the seeming violators of the same.

Those merchants who pollute the stream of Kansas commerce have much to fear from a Consumer Protection Division that continues on the path set forth herein. A much improved system of "target acquisition," coupled with increased emphasis on the filing of enforcement actions, coupled with a no nonsense approach to litigation is the most certain path to guarding the stream of honest commerce in Kansas. Such procedures and polices send a message to those who would prey upon hapless Kansas consumers that they do so at their own economic peril. Our Division has been actively pursuing those merchants operating in Kansas who can be called the "baddest apples" since the Reform of 2003. We have been successful in convincing more than a few to not do business in Kansas ever again. We believe that the continued operation of the model set forth herein will lead to a continued cleansing of the stream of commerce in Kansas, and allow the Office of Attorney General to demonstrate both a strong aversion to dishonest commerce and a strong affinity for honest commerce. This balance is the best approach since honest commerce is a positive economic virtue benefitting the State of Kansas.

It is said that the eldest signer of the United State Constitution, Benjamin Franklin, was approached by a woman soon after signing that magnificent charter of individual liberty. She inquired, 'Dr. Franklin, what have you given us?' The elder statesman wisely replied, 'A republic, madam, if you can keep it.' The price of keeping such a highly valued system of governance is eternal vigilance against the encroaching powers of statist bureaucracy. Those powers have been rolled back in Kansas' Consumer Protection and Antitrust

Division by the Reform of 2003, and Kansas now enjoys the light yoke of a Consumer Protection Division that values healthy commerce and considers itself a friend of honest businesses. Con artists and scammers are now haunted by the spectre of a Consumer Protection Division that wastes little precious time or dear resources on complaints that fall outside of the jurisdiction of the KCPA. Those who intentionally pollute the stream of Kansas commerce must now fear a Consumer Protection Division that chooses to hunt for targets among those businesses that operate in an unlawful manner – rather than a merely dissatisfying fashion.

We have, after the massive restructuring of the past four years, a Consumer Protection and Antitrust Division that once again operates as the 1973 Legislature intended. It is my hope that all future Divisional managers will have the constitutional fortitude to keep it.

Bryan J. Brown
Deputy Attorney General
KS Bar # 17634

Post Script

It is good to give credit where credit is due. All of the Divisional employees identified in the 2005 Annual Report have played a positive role in the implementation of the Reform of 2003. The following list identifies those members of the team who were already "on deck" when the Kline Administration took office and who also played a major role in the

implementation of the policies and procedures that constitute the Reform of 2003.

- Assistant Attorney General Jim McCabria, for imparting vision, constitutional clarity and leadership through the entire process.

- Chief Investigator and Special Agent Jerry Howland, for demonstrating steadfast resolve, exemplary service and a principled demeanor while aiding in the management of the Division.

- Assistant Attorney General Joe Molina for organizing and operating the No Call and Delta Five Task Forces in keeping with the philosophies set forth herein.

- Special Agent Jared Reed, for applying top notch organizational and computerization skills to streamline the process for the good of the order.

- Special Agent Teresa Salts, for thinking outside a longstanding box and identifying areas where systemic changes were needed.

- Special Agent Natalie Hogan, for welcoming the changes and proving beyond cavil that investigations could be more hard hitting and effective because of the changes.

- Consumer Investigator Amber Meseke, for always being ready for a new challenge and for working with steadfast resolve to see all of the new procedures implemented.

- Consumer Investigator Larry Larsen, for always standing ready to catch any balls in play and imparting the wisdom that comes from age to the processes being forged.

- Consumer Support Staff Connie Ullman, for serving as the intercessor between the Division and the public, and for always being prepared to counsel consumers as to the best path toward problem resolution.

- Chief of Staff Eric Rucker, for giving the Division the space necessary to reinvent itself as ordered and for managing the Division with a light reign.

- Attorney General Phill Kline, for being wise enough to recognize that a reinventing of the Consumer Protection Division was sorely needed, and for being courageous enough to allow that constitutionally proper but sometimes unpopular process to take place on his watch.